

THURSDAY

LESSON 8 COMPETITIVE DISCUSSIONS

Lesson 8

TOPIC: CASE DISCUSSION (CHAPTER 8)

OBJECTIVE: Recognize proper ethics, win/win negotiation styles, bargaining techniques, and tactics.

TIME: Thursday 8:00 - 8:40 am

METHOD: Lecture/Discussion

LESSON PLAN

Primary Learning Objective

Condition: Given chapters 1 - 7

Task: Recognize proper ethics, win/win negotiation styles, bargaining techniques, and tactics

Standard: Correctly recognize the above conditions

Have the students read one case at a time. After each case is read, ask for volunteers for the answer to each questions. After everyone has had the opportunity to respond, review the answers for each case given below. Remember, there may be more than one right answer for each case. The "proper" answer often depends on the assumptions the reader makes.

These cases are not testable but they generate a good deal of discussion and force the class to think about possible solutions. The cases reinforce what has already been learned.

The questions and answers for each case follow:

Case 1: Do you agree with Mr. Golly?

Is it ever appropriate to accept a proposal from a sole source contractor without negotiation?

Is the contract price always fair and reasonable when the price is at or below the government estimate? Why or why not?

Answer: There is more than just the government's opinion as to what is fair and reasonable, so it is generally impossible to determine who is right before negotiations take place.

TOPIC: Case Discussions

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Moreover, information and facts surface during the bargaining session that negotiators were not initially aware of before bargaining takes place.

Case 2: Do you agree with Ms. Mallace who believes flexibility is more important than preparation?

Or do you agree with Ms. Crawfish who feels that thorough preparation outweighs the ability to be flexible? Why or why not?

Answer: Both planning and preparation and flexibility are important characteristics of good negotiators. However, flexibility is limited when a negotiator isn't prepared for likely contingencies

Case 3: Do you agree with Captain Kurt or his boss?

Should the government side disclose the \$2 million mistake to the contractor? Why or why not?

Answer: The government should reveal the mistake to the contractor. The FAR 15.610 (c)(4) requires that the government point out contract errors. Disclosing errors is also the ethical thing to do when striving for a "win/win" outcome. However, depending on the circumstances, the government may want to time the disclosure as a way to build trust and credibility.

Case 4: How did Mr. Byrd and Mr. Johnston get off the track?

What was wrong with Byrd's first statement that could have caused the negotiations to get off track? Identify the likely application of five win/lose negotiation tactics. Describe where these tactics appeared in the different statements of each side.

Answer: Byrd's initial statement appears to be a Rule 9 violation ("Say it right") because he does not give an explanation as to why the 12 percent profit is too high. In a situation like this, Johnston would naturally take offense if he interpreted "too high" to mean only 6 percent or less would be

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acceptable to the government. In this case, both sides had reasonable positions for what they felt was the correct profit. This case also shows the application of five negotiation tactics.

- "Funny money" is the most obvious tactic because a percentage was continually used as a symbol for the amount of profit in question.
- Byrd's first statement indicates an application of the "Crunch" tactic because it could be interpreted as "You have to do better than that."
- Johnston invoked "Legitimacy" when he argued that 12 percent was what the contractor received on the basic contract, and when he stated that 12 percent was standard for his company's fixed price contracts.
- The "Bogey" or "Limited Authority" tactic was also applied when Byrd claimed that he couldn't agree to the proposed profit because his contracting officer would just reject the deal.
- Finally, "Invoking False Competition" was used in Johnston's fourth statement when he said "The next guy we deal with after you won't think so."

Case 5: What is wrong with the negotiation techniques of Ms. Frathouse and Mr. Bradford? Specifically, which bargaining rule was repeatedly violated in every statement? (Review each statement to illustrate the violations)

Answer: Both sides were flagrantly guilty of "Say it right" (Rule 9) violations. Have the class go over each of the statements one at a time to point out the most obvious violations.

- *Bradford's first statement.* Too confrontational by using personal pronouns when disagreeing - stating "you" and "we" twice in what appears to be an antagonistic (us against them) manner. Opening with Ms. Frathouse's first name of Vicki could also be viewed as condescending if they were just introduced or she was not on a first name basis with Bradford.
- *Frathouse's first statement:* Frathouse used the provocative terms "guess-timates" and "unearned profits." She also made the inflammatory statement, "I can't throw away taxpayer's money like that" implying that Bill's proposal would waste the taxpayer's money.
- *Bradford's second statement:* Bill used the provocative ultimatum "take it or leave it." He also implied that Vicki was unpatriotic by stating that he was willing to take a chance for the security of our nation and that he believed in the

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Constitution; thereby implying that Vicki wasn't willing to take a chance and did not believe in the US Constitution. Finally, Bill stated in a righteous manner that "My father fought in the "Big One" – a statement that had absolutely no bearing on the negotiation.

- *Frathouse's second statement:* Vicki made two very provocative statements by saying "you know it" and "\$390 is ridiculous!". These statements insinuate that Bradford was lying. When she referred to her contract administration role, she also made a not too subtle implication that the contractor would be punished by not agreeing to her terms . Vicki made the final threat obvious by saying, "I hate to see that relationship endangered..."

TOPIC: COMPETITIVE DISCUSSION (CHAPTER 8)

OBJECTIVE: Conduct competitive discussions.

TIME: Thursday 8:40 - 9:10 am

METHOD: Lecture

LESSON PLAN

Ref.

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Primary Learning Objective

Condition: Given an RFP, proposals, analysis reports, prenegotiation plan, and the prenegotiation strategy

Task: Conduct competitive discussions.

Standard: Select and correctly apply tactics to accomplish the Government's negotiation strategy, resulting in a best and final offer that accomplishes the Government's highest priority objectives for the negotiation.

In competitive negotiations, comply with FAR 15.610(d) --no technical leveling, no technical transference, and no auctioning. Only disclose information to participants in discussions that may be disclosed under FAR 15.413.

TOPIC: Competitive Discussions

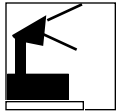
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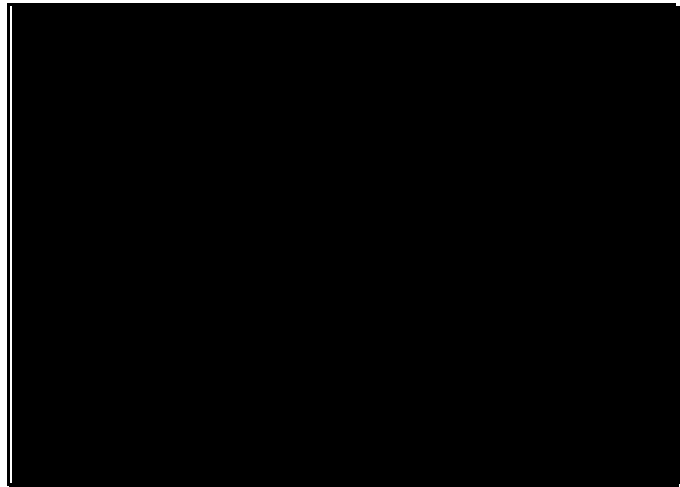
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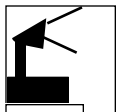
a. Discuss the FAR 15.601 definition of discussion.



8-1



Includes any meaningful communication, oral or written, between the government and an offeror, other than communications only for the purpose of minor clarification.



8-2

Competitive Discussions Defined

- Meaningful communication with multiple offerors
- Communicates information essential in determining proposal acceptability
- Provides offerors with opportunity to revise initial proposal

Text 8.0, p. 116

All competitive discussions are accomplished in private communication between each offeror and the government that:

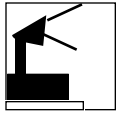
- Involve information essential for determining the acceptability of a proposal or
- Provide the offeror an opportunity to revise or modify its proposal

TOPIC: Competitive Discussions

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Ref.**Steps In Presenting The Topic****Instructor Notes****b. Discuss the effect of competitive discussions on competition.**

Since each proposal offers distinct supplies or services, discussions are needed to determine which proposal will best fill the government requirement.

c. Identify distinguishing characteristics of the discussion process.

8-3

Bargaining Environment Differences

- Increased government bargaining power
 - Multiple sources instead of a single source
 - Competition between offerors
- Unfavorable aspects
 - Unrealistically low offers ("buy-in")
 - Government temptation to use win/lose tactics and break rules
 - Collusion between offerors
 - Use of unsavory methods to illicitly obtain information

Text 8.1, 117

Before selecting the winning contractor, the government can hold "meaningful discussions" with those offerors falling within a competitive range. This process allows the government to bring out proposal weaknesses and deficiencies so offerors can make improvements before submitting a best and final offer (BAFO).

d. Discuss bargaining environment differences between competitive discussions and sole source procurements.

Include in the discussion the importance of contract price and evaluation criteria.

TOPIC: Competitive Discussions

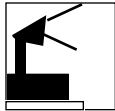
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- e. Discuss the fundamental differences between the bargaining environments of competitive and sole source procurements.**



8-4

Distinguishing Characteristics

- Non-price evaluation factors
 - Technical appraisal
 - Business and management assessment
 - Past performance
- Discussion with offers in competitive range
- Desired outcome:
 - not reach final agreement
 - persuade offeror to submit an improved BAFO

Text 8.2, p. 118

The primary difference being the greater bargaining power possessed by the government because of competition.

- f. Discuss the implications of the bargaining power differentials with the students, including**

- The potential for "buy-in" contractors,
- Use of unsavory methods to obtain the contract, and
- Government exploitation of favorable circumstances with win/lose negotiation styles.

- g. Discuss non-price evaluation factors, including:**

- Technical evaluation
- Business and management evaluation
- Past performance

- h. Define competitive range.**

Competitive range is established once all offerors are rated according to the evaluation criteria found in the RFP. **The competitive range should include all offerors who have a reasonable chance for selection once discussions are held.** The government must hold discussions with all offerors falling within the competitive range.

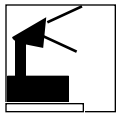
TOPIC: Competitive Discussions

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In contrast to noncompetitive negotiations, where mutual agreement is a desired conclusion, **competitive discussions do not end in a deal. Offerors are only encouraged to submit their best and final offers (BAFOs).** The government compares the BAFOs and selects the successful proposal after all evaluation factors have been considered.

i. Discuss the possible outcomes of competitive discussions.



8-5

Possible Outcomes

- BAFO improved per discussion
- BAFO unchanged
- Unexpected BAFO changes

Text 8.2, p. 119

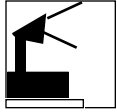
Instead of attempting to reach mutual agreement and finalize a deal, the primary goal of the government in discussions is to persuade each offeror to submit a BAFO that represents an improvement over the earlier proposal.

Discuss options of offerors, such as

- Removing themselves from consideration,
- Making no changes, or
- Making changes that have no relationship to the discussions.

TOPIC: Competitive Discussions**LESSON PLAN****Ref.****Steps In Presenting The Topic****Instructor Notes**

- j. Discuss the steps in conducting competitive discussions, including



8-6

Competitive Discussion Steps

- Safeguard confidential information
- Brief government team on special rules
- Conduct discussions
 - resolve technical uncertainties
 - disclose deficiencies
 - provide opportunity to revise BAFO
- Evaluate BAFOs
 - make recommendations to SSA
 - debrief losing offerors

Text 8.2, p. 120

- The need to prepare the physical environment,
- Brief the government team, and
- Conduct the discussions.
- Evaluate BAFOs and debrief

The physical environment for competitive discussions is essentially the same as the environment for sole source negotiations with the major exception of increased security considerations. By safeguarding information, the government can ensure that offerors do not get an unfair advantage by having access to unauthorized information, such as competitive proposals or confidential government evaluations.

Immediately prior to the discussions, the chief negotiator should brief the team on the following:

- Protocol
- Differences between competitive discussions and other forms of negotiations
- Not disclosing information that could lead to technical leveling, technical transfusion, or auctioning.

The content and extent of discussions with each offeror will be determined by the individual characteristics of each proposal. The contracting officer is required to:

TOPIC: Competitive Discussions

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- Attempt to resolve uncertainties concerning the technical aspects or other terms of the proposal. However, suspected mistakes should be identified without revealing information about another proposal.
- Advise each offeror with proposal deficiencies to provide them with an opportunity to satisfy the government requirements.
- At the conclusion of discussions, give all offerors still within the competitive range the opportunity to submit a BAFO by providing them an equal amount of time to revise their proposal.

The primary goal of the government in competitive discussions is to persuade each offeror to submit a BAFO that represents an improvement over the earlier proposal. Offerors are free to:

- Remove themselves from consideration
- Make no changes at all in their BAFO
- Make changes that have no relationship whatsoever to the discussions.

k. Discuss the "special rules" for competitive discussions and the Comptroller General (GAO) requirement that discussions be meaningful.

To conduct meaningful discussions, the government must disclose deficiencies, uncertainties or mistakes, and provide an opportunity for revision of the proposal. All offerors must be provided an opportunity to submit a "best and final offer" but **it is up to the offeror to determine if and how their offer should be modified.**

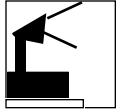
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8-7

l. Disclosing deficiencies.

<small>Special Rules</small>
<p>Disclosing Deficiencies</p> <p>Disclose deficiencies without providing comparisons with competing proposals, such as:</p> <ul style="list-style-type: none"> • Failure to meet specifications • Failure to submit required information • Unrealistic cost estimates • Questionable technical or management approaches <p><small>Text 8.4, p. 121</small></p>

Deficiencies are any parts of a proposal that fail to satisfy the government requirements. Deficiencies are derived from the evaluation of each proposal against the specific evaluation criteria or minimum requirements in the solicitation.

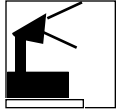
Deficiencies are not to be derived from a comparative evaluation of relative strengths and weaknesses of different proposals.

m. Discuss examples of deficiencies, such as

- Unrealistic cost estimates,
- Failures to meet specifications,
- Failures to submit information, or
- Questionable technical and management approaches.

TOPIC: Competitive Discussions

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Ref.**Steps In Presenting The Topic****Instructor Notes****n. In competitive discussions, you cannot:**

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Special Rules

What You Cannot Do

- Disclose information about other offers
- Use auction techniques
- Engage in technical transfusion
- Engage in technical leveling

Text 8.4, p. 122

- Disclose information about other offerors or otherwise tell one competitor about the offers of other competitors since such action could give some firms an unfair advantage.
- Use auction techniques, such as:
 - Indicating to an offeror a cost or price that it must meet to obtain further consideration,
 - Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its price is considered by the government to be too high or unrealistic), and
 - Otherwise furnishing information about other offeror's prices.
- Engage in technical leveling—helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, by pointing out weaknesses resulting from an offeror's lack of diligence, competence, or inventiveness in preparing the proposal.
- Engage in technical transfusion — disclosing technical information provided by one offeror to another offeror, resulting in improvements to the second offeror's proposal.

TOPIC: Competitive Discussions

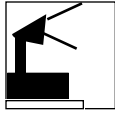
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o. In competitive discussions, you must:



8-9

Special Rules

What You Must Do

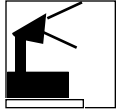
- Treat all offerors the same
- Identify suspected technical uncertainties
- Identify suspected pricing deficiencies
 - Over-estimates
 - Mistakes (under-estimates)
- Provide opportunity to revise proposal

Text 8.4, p. 122

- Treat all offerors fairly and equally.
- Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal, especially those that would have an impact on price.
- Advise the offeror of reasons for believing that the price is unreasonably high based on (a) data from the offeror, and (b) comparisons with historical prices, commercial prices, yardsticks, and other estimates.
- Identify suspected pricing mistakes by bringing them to the offeror's attention as specifically as possible without disclosing information concerning another proposal or the evaluation process. This is especially important when the proposed price appears to be a "buy-in" and is far below your minimum position as to not be considered fair and reasonable.
- Provide the offeror a reasonable opportunity to submit any pricing, technical, or other revisions to its proposal that may result from the discussions.

TOPIC: Competitive Discussions

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Ref.**Steps In Presenting The Topic****Instructor Notes****p. In competitive discussions, you also can:**

8-10

Special Rules	
What You Can Do	
<ul style="list-style-type: none"> • Point out proposal variations from RFP • Discuss potential tradeoffs • Persuade the offeror to improve on price in the BAFO • Point to indicators that price is too high <ul style="list-style-type: none"> – Data from that offeror – Historical prices – Commercial prices – Reach informal agreement – Cost-estimating relationships – Reach informal agreement 	
Text 8.4, p.123	

- Point out any proposal variation from the RFP that you believe is unnecessary and may have affected the proposed price.
- Discuss potential tradeoffs between price and other contract terms.
- Point to indicators that the proposed price is too high, such as the producer price index, historical or commercial prices, and cost estimating relationships.
- Ask the offeror to "sharpen its pencils" or otherwise urge the offeror to improve on price in the BAFO – especially when coupled with a persuasive presentation of facts and reasoning supporting your contention that the offeror could do better on price.
- Present a position on price and the rationale for that price. The Comptroller General¹ ruled that contracting officers can:

¹In the matter of Racial Guardata, Inc. (B-245139.2, February 7, 1992), the contracting officer asked one offeror to reduce its price by 10 percent and another by 30 percent. The Comptroller General did not consider this to be "a prohibited auction" since the Government's price objective for each offeror was based on a comparison of the proposed price with catalog prices and prior contract prices – not with other offered prices.

TOPIC: Competitive Discussions

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	<ul style="list-style-type: none">- Develop a separate negotiation price objective for each proposal based on a separate appraisal of that proposal- Disclose that objective to the offeror as a negotiation tool for reaching an agreement as to a fair and reasonable price.	
	<ul style="list-style-type: none">• Obtain informal agreement on terms and conditions with the expectation that the BAFO will reflect the results of the discussion.	

TOPIC: COBURN-CALLAWAY CASE GROUP PREPARATION

OBJECTIVE: Negotiate

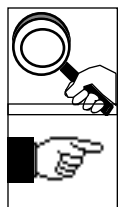
TIME: Thursday 9:30 - 10:30 am

METHOD: Small Group Work

LESSON PLAN

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COBURN-CALLAWAY GROUP PREPARATION



- a. Coburn-Callaway Case group preparation should proceed in the same manner as the Scan and Protecto group preparations **with the following exceptions:**
 1. Assign the classroom to the two government teams. One additional room should be assigned to the two Coburn teams while the other room should be assigned to the Callaway teams.
 2. Never assign teams representing different negotiation sides to the same room.
 3. Write the preparation, negotiation, and critique times on the board. Give two 45 minute discussion sessions for each offeror and 1 hour for the critique. (Note: Each discussion session includes breaks and caucus time and does not end until the 45 minutes have elapsed or until both sides agree to adjourn the session.) Each government team should plan on two 45 minute sessions with each contractor team.
 4. At the conclusion of all discussions, each Coburn and Callaway will have 10 minutes to prepare their individual BAFO to submit to the government team.
 5. After BAFO submission the government team has 5 minutes to prepare a recommendation to the instructor who plays the role of the Source Selection Authority (SSA).
 6. Write the discussion schedule for each contractor team on the board showing the time each of the two sessions begins and ends, including the lunch hour.

PREPARATION PHASE INSTRUCTOR DUTIES

- a. **Do not** brief the students on the key discussion issues peculiar to the case until after the negotiations.

TOPIC: Coburn-Callaway Group Preparation

LESSON PLAN

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	b. Students should have read the case they will negotiate the night before.	
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	c. Spend an equal amount of time observing the individual groups prepare their cases.	
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	Care should be exercised to ensure that any questions you answer do not give one team an unfair advantage over another, or more information than the other teams have.	
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	d. Review to yourself the Comptroller General decisions related to Competitive Discussions on the following pages.	
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The Coburn-Callaway case is based on these decisions.

TOPIC: COBURN-CALLAWAY CASE NEGOTIATION

OBJECTIVE: Negotiate

TIME: Thursday 10:30 - 2:30 am

METHOD: Small Group Work

LESSON PLAN

Ref.	Steps In Presenting The Topic	Instructor Notes
	<p>COBURN-CALLAWAY CASE NEGOTIATION (3 hours 10 minutes)</p> <p>a. Students generally do not feel they have enough time to fully prepare for the case and may even feel uncomfortable on the topic of competitive discussion.</p> <p>However, you should be prepared to end the preparations on time so that the negotiations begin as scheduled.</p> <p>b. Observe as much of the negotiations as possible by watching all negotiation sessions.</p> <p>Take notes on both the good things and mistakes that have occurred, PAYING PARTICULAR ATTENTION TO THE KEY DISCUSSION ISSUES AND APPLICATION OF SPECIAL RULES FOR COMPETITIVE DISCUSSION, APPROPRIATE BARGAINING TECHNIQUES, NEGOTIATION TACTICS AND NONVERBALS. Especially, watch for violations of What You Can't Do in Chapter 8. Examples to watch for are those that imply inappropriate comparisons with other competitive proposals.</p> <p>Students can often learn from their mistakes. Look for noncompliance with the standard.</p> <p>Be particularly alert for Rule 9 (Say It Right) violations and win/lose negotiation styles. Write down your observations noting the particulars of each situation.</p> <p>c. Even though some students will have questions, generally do not provide answers during either the bargaining session or the caucus/breaks that ensue.</p>	

TOPIC: Coburn-Callaway Negotiation

LESSON PLAN

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	<p>This forces the students to solve problems themselves and ensures the teams with questions are not provided more information than other teams.</p> <p>LET THE STUDENTS MAKE MISTAKES UNLESS THE MISTAKES ARE DETRIMENTAL TO THE LEARNING PROCESS. The learning experience can often be enhanced by someone's mistakes.</p> <p>d. Encourage the students to think win/win.</p> <p>e. Remind the students to adhere to the special rules for competitive discussion.</p> <p>f. Discourage students from finishing early.</p> <p>g. Ensure that the assigned chief negotiators are doing the talking. If necessary, remind teams members who speak without specific chief negotiation approval to stay quiet.</p> <p>h. Give students 1 hour for lunch.</p>	

TOPIC: COBURN-CALLAWAY CASE CRITIQUE

OBJECTIVE: Negotiate

TIME: Thursday 2:30 - 3:30 pm

METHOD: Small Group Work

LESSON PLAN

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COBURN-CALLAWAY CASE CRITIQUE

(1 hour)

- a. **Reassemble the students in the classroom and review the group negotiations that just took place.**

This review is focused on the key discussion issues for the case and the application of proper bargaining techniques, negotiation tactics, and nonverbals, and, in particular, the appropriate application of the special rules for competitive discussion.



- b. **Because some students are sensitive to criticism, you should use care in illustrating inappropriate behavior to ensure that students do not take the criticism as a personal attack.**
- c. **Compare the outcomes of the different teams using the following matrix.**

Teams		Initial Proposal Price (In Millions)	BAFO Amount (in Millions)	Technical Evaluation Score	Price Evaluation Score	Total Evaluation Score
A	F (Coburn)	\$5.8 M				
A	C(Callaway)	\$2.0 M				
B	D(Coburn)	\$5.8 M				
B	E(Callaway)	\$2.0 M				

ANALYSIS OF POSSIBLE OUTCOMES

1. Design. The case is designed to put extreme pressure on the government team to either (1) persuade Callaway to submit a realistic BAFO, or (2) persuade Coburn to submit a reasonably priced BAFO, or (3) both. If BAFO prices vary little from initial prices, then the scoring system will call for award to Callaway (47+30 beats 68 + 0).

TOPIC: Coburn-Callaway Critique

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2. Possible Outcomes. When discussing the **outcomes**, inform that the class that the Instructor is the Source Selection Authority and will be announcing his/her decision based in part on the source selection recommendation of the government team. Remind students that the Comptroller General allows the source selection authority to depart from source selection recommendations based on reasoned judgment.

Also, after discussing the outcomes of the two competitive discussions held in class, also discuss the other possible options with the class (especially the worst case scenario).

<i>Outcome</i>	<i>SSA Reaction</i>
The Callaway BAFO is priced realistically (at least \$3.5) and more than \$200,000 below the Coburn price. The BAFO score for Callaway (assuming that Callaway remains the low offeror) jumps to $67+30 = 97$.	Announce that the Source Selection Authority awards to Callaway. Praise the government team for doing an excellent job of persuasion. Inform the Callaway team that they gambled with their jobs and won. (Note: government side was told that if Callaway comes back with a realistic price, their score would rise from 47 to 67 points.)
Both BAFOs are reasonably priced, and the Coburn BAFO beats or is within \$100,000 of the Callaway price. Coburn beats Callaway on points ($68+30$ vs. $67+30$).	Announce that the Source Selection Authority awards to Coburn. Praise the government team for doing an excellent job of persuasion. Inform the Callaway team that all team members have been fired for disregarding management instructions.
Both BAFOs are reasonably priced and are tied ($67+30$ vs. $68+29$).	Announce that the Source Selection Authority awards to Coburn (because technical factors are more important than price; hence Coburn's one point technical edge outweighs Callaway's one point edge on price). Praise the government team for doing an excellent job of persuasion. Inform the Callaway team that all team members have been fired for disregarding management instructions.
The Callaway BAFO is still unrealistic, and the Coburn BAFO comes within \$2 million of the Callaway BAFO (e.g., \$4 million vs. \$2 million).	Announce that the Source Selection Authority awards to Coburn on points ($68+10$ vs. $47+30$). Praise the government team for doing an excellent job of persuasion in its discussions with Coburn. Inform the Callaway team that all team members have been fired for paying too much attention to management instructions.

TOPIC: Coburn-Callaway Critique

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Ref. **Steps In Presenting The Topic** **Instructor Notes**

<i>Outcome</i>	<i>SSA Reaction</i>
Neither BAFO departs significantly from initial prices (Worst case scenario) . The Callaway BAFO is ahead on points (Coburn needs at least 9 points on price to tie or move ahead of Callaway).	The government has a number of options in such situations, none terrific. Go over the following.

FIVE OPTIONS FOR THE WORST CASE SCENARIO

1. Award to Callaway.

This would put the government at great risk — especially if Callaway shortcuts cause a meltdown. This is probably the worst option.

2. Regardless of the point scores, determine that the Callaway proposal is NOT technically acceptable given the inherent performance risks .

The Comptroller General allows the SSA to disregard point scores and come to his or her own conclusion about the technical merits of a BAFO, as long as that conclusion is NOT arbitrary or capricious. If this option is selected by the SSA, the Callaway proposal in effect would be expelled from the competitive range. Negotiations could continue with Coburn on a sole source basis (in which case Coburn would have to submit certified cost or pricing data and bargain on price).

3. Ask the contracting officer to determine whether Callaway is responsible.

The question is whether Callaway has affirmed that it has the necessary technical skills or the ability to attain them (FAR §9.104-1(e)), in view of the fact that proposed wage rates are likely to be unsuccessful in attracting the skills necessary to perform the work. If the contracting officer cannot affirm that Callaway is responsible, the government could enter into a sole source negotiation with Coburn based on certified cost or pricing data.

TOPIC: **Coburn-Callaway Critique**

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4. Call for a second round of discussions and BAFOs.

Multiple BAFOs are discouraged because the practice comes too close to auctioning. However, there is an exception to every rule. In this case, neither offeror has made a good faith attempt to adjust its BAFO in response to deficiencies identified during discussions by the government. Another round of BAFOs might make the parties pay more attention to the government's concerns in the next round of discussions.

5. Cancel and resolicit.

If the government can stand the delay, this is the best option. We know from the case that none of the contractors managing comparable nuclear facilities bothered to compete. A new RFP might attract their interest. Assuming that the government can retain its current staff through another competition, this could well be the best choice.

TOPIC: Coburn-Callaway Critique

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COBURN/CALLAWAY CASE KEY DISCUSSION ISSUES

The following key discussion issues for the Coburn/Callaway Case are to be covered during the critique.

a. The bargaining power on the government side is much greater in competitive discussions than in sole source negotiations.

In this case as in real life situations, contractors are extremely anxious to win the government contract. The competitive nature of the discussions often tempts contractors to come in with unrealistically low prices as was the case with Callaway. Does the government side succeed in getting Callaway to raise their unrealistically low bid of \$1.9 million? If the Callaway bid is still below \$3.0 million does the government accept the unrealistically low price knowing that poor performance could risk nuclear disaster?

b. In competitive discussions the government side has a temptation to "auction."

Auctioning is forbidden in competitive discussions but the temptation nevertheless still exists. In discussions with Coburn, did the government side somehow indicate that the offer from Callaway was lower than the Coburn proposal? In discussions with Callaway did the government side suggest that Callaway had plenty of room to increase their price because the Coburn offer was much higher?

For example, does the government side inadvertently use auctioning techniques by saying in words to the effect "If you don't come down (or up) on price, your firm is unlikely to win the contract". Likewise, does the government suggest that one proposal is much lower or higher than the competitive proposal. (Note: indicating a proposal is priced differently than historical prices or other contracts is permissible.)

c. In competitive discussions the government side should not reach final agreement on contract award.

The objective of competitive discussions is a BAFO that improves on the initial proposal. The government side should not reach final agreement. However, informal mutual understanding on what the BAFO will say is permitted as long as the government implies nothing on whether the BAFO will win award. In this case, did the

TOPIC: Coburn-Callaway Critique

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government side indicate contract acceptance if changes are made to the BAFO?

d. Without revealing information about other offerors, the government should make intelligent use of information, such as cost estimates, to point out proposal deficiencies.

In this case, does the government side properly tell Coburn their estimate is significantly higher than the price paid to other laboratory contractors? Does the government indicate the reasons for the higher Coburn price (higher hourly wages and burden rates)? Similarly, does the government indicate to Callaway that their compensation rates seem unrealistic when compared to wage rates for similar work? Does the government side express concern that Callaway would have a difficult time retaining employees and thereby risk satisfactory contract performance? Was Callaway informed that their fully burdened rates appear unrealistically low which could also risk contract performance?

TOPIC: AIRMAC CASE PREVIEW

OBJECTIVE: Negotiate

TIME: Thursday 3:25 - 3:30 pm

METHOD: Small Group Work

LESSON PLAN

Ref.

Steps In Presenting The Topic

Instructor Notes

PREVIEW OF TOMORROW'S NEGOTIATION



Condition: Given Chapters 1-7 and 9

Task: Negotiate (Airmac Case)

Standard:

- Comply with all bargaining techniques.
- Correctly recognize and interpret nonverbal cues.
- Given the nonverbal cues, make appropriate adjustments to tactics, and one's own verbal and nonverbal messages.
- Apply tactics only when appropriate for the situation and effectively use each selected tactic.
- Recognize tactics used by the other party.
- Effectively counter tactics used by the other party.

TOPIC: Airmac Case Preview

LESSON PLAN

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- a. Determine the group matchup for tomorrow by using the following matrix:**

<u>Contractor</u>	<u>Government</u>
A	B
F	D
C	E

Teams A, F, and C will now be contractors, and B, D, and E are now the government for tomorrow's exercise.

- b. Pass out the Airmac case, giving the government and contractor teams their appropriate handouts.**

TOPIC: **Airmac Case Preview**

LESSON PLAN

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TOPIC: COMPTROLLER GENERAL DECISIONS ON
COMPETITIVE DISCUSSIONS

LESSON PLAN

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**Comptroller General Decisions
Regarding
COMPETITIVE DISCUSSION**

The following are Comptroller General decisions relevant to the Coburn-Callaway case (for the instructor's eyes only).

Case 1: “You can do better on labor costs”

B-238875, Matter of: Business Information Management Corporation, July 17, 1990

DIGEST

1. Cost discussions were meaningful where record establishes that the contracting agency indicated to the high-priced offeror that its costs should be reduced, and the offeror did, in fact, lower its price proposal. Agency reasonably did not discuss technical areas where the evaluators found no technical weaknesses or deficiencies in the proposals which were included in the competitive range.

2. Protest that contracting agency should have performed in-depth cost realism and most probable cost analyses is denied where solicitation essentially requires awardee to provide a fixed number of full-time staffers to perform the work described, at firm, fixed-price, loaded hourly labor rates, and provides that for evaluation purposes these rates shall be multiplied by the number of hours in a year of full-time work.

TOPIC: Comp. Gen. Decisions on Competitive Discussions

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DECISION

Business Information Management Corporation (BIMCO) protests the award of a contract to Synetics Corporation issued by the Customs Service, Department of the Treasury, under request for proposals (RFP) No. CS-90-005. BIMCO, the incumbent contractor for related services, alleges that the award is improper because the Customs Service did not conduct meaningful discussions with the firm, misapplied the cost evaluation criteria, and failed to provide a common basis for competition.

We deny the protest in part and dismiss it in part.

The RFP requested offers for a firm, fixed-unit price, indefinite quantity contract for electronic data processing services in technical areas pertaining to conceptual design, general systems design, telecommunications, hardware/software, systems evaluation and performance optimization of Customs' Large Systems. The RFP required offerors to provide loaded unit rates for eight labor categories identified in the solicitation as: program manager, senior system & designer/programmer, senior system programmer, senior systems engineer, system engineer, senior systems analyst, system programmer and technical editor. The RFP required the contractor to supply the necessary personnel, facilities and material to perform individual task orders as issued, in six areas specified in the statement of work. The contract is for a base period with three 1-year options.

The RFP provided that offers would be based on level of effort estimated at a total of 68,000 hours of direct labor for the base period and all three option periods. The RFP evaluation formula assigned a maximum of 70 points for technical merit and 30 points for price and provided that award would be made to the offeror whose proposal was most advantageous to the government, price and other factors considered.

Seven firms, including BIMCO and Synetics, submitted initial proposals and, after evaluation, three of the seven were determined to be in the competitive range. The contracting officer determined that there were no deficiencies in any of these three proposals; therefore, discussions on cost issues only were held, after which all three offerors submitted best and final offers (BAFOs). A price analysis and a most probable cost determination were performed on the BAFOs using a scoring formula that gave the lowest-priced,

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technically acceptable offer the maximum cost points, with other, higher-priced offers receiving proportionally less cost points.

Synetics received a final total score of 85 points, consisting of a technical score of 55 out of a possible 70 points, and 30 out of a possible 30 points for its \$3,590,339 BAFO price. BIMCO received a total score of 84.44 points, 61 points for technical merit, and 23.44 points for its BAFO price of \$4,591,158. The total score for the third offeror was significantly lower than BIMCO's score. After reviewing the technical and price evaluation results, and determining that there was no meaningful difference between the BIMCO and Synetics technical proposals, the contracting officer concluded that the Synetics' proposal was most advantageous to the government. The contract was awarded to Synetics and this protest followed.

BIMCO's primary basis of protest is that the Customs Service failed to conduct meaningful discussions because the agency failed to advise BIMCO that its offer was not priced competitively, or to discuss BIMCO's direct labor rates or understanding of the labor categories, and did not inform BIMCO that the procurement had requirements which differed from the initial contract. BIMCO claims that it reasonably perceived the RFP to be a follow-on contract requiring sophisticated software development, programming, and oversight services because it had performed such work as the incumbent contractor under the prior contract. As a result, BIMCO asserts that its proposed staff consists of highly experienced individuals with unique, sophisticated and costly software development and programming abilities. BIMCO alleges that this caused its direct labor rates to be inflated with the result that its proposal was grossly overpriced. BIMCO also alleges that the RFP did not adequately define the required labor categories, an impropriety which affected BIMCO's calculation of its direct labor rates. (FN1)

According to the protester, during oral discussions with BIMCO officials, the contracting officer identified only minor weaknesses in BIMCO's cost proposal. BIMCO has provided signed statements from its employees in which they recall that the contracting officer only questioned BIMCO's general and administrative (G & A) expenses, overhead, and proposed raises for certain employees. BIMCO asserts that because the contracting officer did not discuss BIMCO's "overlapping excesses/weaknesses in its technical and cost proposals," or inform BIMCO that, unlike the predecessor

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contract, the current requirement called for oversight functions only, BIMCO incorrectly assumed that the contracting officer considered BIMCO's personnel to be consistent with the agency's minimum needs, and that BIMCO's direct labor rates were reasonable.

As a result, BIMCO claims that it simply reduced its G & A, decreased one proposed salary raise, lowered the rates for two unfilled positions, and slightly increased the labor rates for three of the eight positions. Conversely, in other instances, BIMCO's direct labor rates and escalation factor were slightly increased. Accordingly, BIMCO maintains that its staffing and pricing were excessive because meaningful discussions were not conducted.

The Customs Service concedes that discussions were limited to cost issues but states that the discussions encompassed BIMCO's direct labor rates. According to the contracting officer, she informed BIMCO that its proposed labor rates were too high and that its "over-all" rates, i.e., labor rates plus overhead, escalation, and profit, were not competitive. In addition, she recalls telling the firm, while discussing its labor rates, "to sharpen its pencils."

In the context of this procurement, the record shows that Customs Service held meaningful discussions with BIMCO. Where, as here, the evaluators identified no deficiencies in the technical proposals, the contracting officer is not required to inform an offeror of areas in its technical proposal that could be improved. The protester asserts that the contracting officer was required to discuss qualifications in "excess" of the government's needs. However, the contracting officer did not determine that BIMCO personnel were overqualified. On the contrary, while the technical evaluators did rate BIMCO's proposal highest technically (61 out of 70), it was also noted that several senior BIMCO personnel lacked college degrees but that this was compensated for by their extensive experience in large scale database systems. In our view, the record reflects that BIMCO could not simply have substituted less qualified, lower- paid personnel, without suffering a corresponding diminution in its technical score. Thus, we find that the contracting officer had no basis to advise BIMCO that the qualifications and wages of its proposed personnel were "excessive."

Regarding the content of the cost discussions, the record contains an apparent dispute between the parties regarding the discussion of direct labor rates. As noted above, BIMCO furnished sworn

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statements from its employees concerning this issue. In one such statement, the affiant states "(a)t no point was any discussion held on direct labor rates-either for BIMCO personnel or subcontractors." However, the same affiant also states:

"(a)t no time do I recall (the contracting officer) giving any indication other than she was doing her standard negotiation. In fact, my feeling was that she was doing the normal get the best deal for the government job." (Emphasis in original).

The agency's written memoranda of discussions held with BIMCO indicate that prior to discussions the contracting officer identified low and high objectives for negotiation of each labor category in BIMCO's initial offer. Her post- negotiation memorandum sets forth the negotiated rates for each such category. In its BAFO, BIMCO stated that it had made "some significant adjustments." The adjustments noted all pertain to price decreases, including labor rate decreases for four of eight listed staff positions. While BIMCO insists that the contracting officer did not discuss the most substantial weakness in its cost proposal—BIMCO's "inflated" direct labor rates—the changes in its BAFO together with BIMCO's statement that the contracting officer was negotiating the "best deal for the government" support the contracting officer's position that BIMCO was advised that its pricing was not competitive. See FAA Seattle Venture, Ltd., B-234998.2, Aug. 9, 1989, 89-2 CPD P 116.

Although the record does not establish that specific, direct labor rates were discussed, it is clear that BIMCO was advised that all of its proposed costs, which consist primarily of direct labor costs, were not competitive. While BIMCO argues that it was entitled to detailed discussion regarding the excessiveness of each of its specific labor rates, we believe that the agency reasonably provided BIMCO with more general guidance concerning its high cost. In this regard, we note that the Federal Acquisition Regulation (FAR) prohibits agency disclosure to one offeror of its price standing relative to another offer during discussions, FAR s 15.610(d)(3)(ii), thus it would have been inappropriate for the contracting officer to have advised BIMCO of the level of its direct labor rates relative to its competitors' rates. **Further, the content and extent of discussions is a matter of the contracting officer's judgment based on the particular facts of the procurement.** Randtron Sys., B- 237354, Feb. 14, 1990, 90-1 CPD P 277. **There is no requirement that agencies conduct all-encompassing**

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discussion; rather, agencies are only required to reasonably lead offerors into those areas of their proposals considered deficient within the context of the procurement. Syscon Serv., Inc., 68 Comp.Gen. 698 (1989), 89-2 CPD P 258. **Given the totality of the record we find that the contracting officer reasonably apprised BIMCO that its cost proposal was not competitive.**

As to BIMCO's assertion that it assumed that programming responsibilities were included in this contract, based on its experience as an incumbent, the simple answer is that no such tasks were described in the statement of work, and while BIMCO may have performed such work in conjunction with initiating the system under the prior contract, there was no reasonable basis for an offeror to conclude that the current, follow-on RFP encompasses such a requirement.

Next, BIMCO challenges the evaluation of cost proposals on the basis that the evaluation was inconsistent with the RFP. BIMCO alleges that the agency utilized a "mechanistic government formula" in evaluating BAFOs which precluded consideration of several specific cost realism variables, to its prejudice. Clause M.5 of the RFP entitled "Cost Evaluation" requires in relevant part:

"... a cost/price evaluation will be performed ... (and) will consist of conducting an analysis of each individual proposal to first determine if proposed costs accurately and adequately portray the work that is to be performed, and if they are reasonable and realistic. This review will also take into consideration the probable cost to the Government, including the evaluation of any options and any other costs that the may bear or incur from selection of the individual proposal. Once that is completed, each proposal will be compared with other proposals that are considered technically acceptable and otherwise qualified for award. The lowest evaluated technically acceptable offeror will receive the maximum consideration in terms of the cost/price evaluation, and other higher evaluated offerors will receive proportionally less...."

It is BIMCO's view that the contracting officer did not adhere to the required evaluation scheme. BIMCO maintains that the contracting officer's determination of price reasonableness merely consisted of the breakout of the base labor rates into their component part, i.e., labor, overhead, G & A, escalation and profit; and, her determination of most probable cost to the government consisted solely of multiplying the base rates times the level of

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effort without consideration of "other costs" that the government would incur as a result of an award to an individual offeror.

Generally, the requirement for a cost realism analysis arises when an agency contemplates the award of a cost reimbursement contract. Where a fixed-price contract is contemplated, "cost realism" need not be considered. Here, the award is for an indefinite quantity service contract which encompasses elements of both fixed-price and cost-type contracts. While an in-depth cost analysis is not required when an agency contemplates award of an indefinite quantity fixed-price contract, contracting agencies should conduct a review of the proposals adequate to ensure that the proposed prices are reasonable. *Research Management Corp.*, B-237865, 69 Comp.Gen. ___, Apr. 3, 1990, 90-1 CPD P 352. In this case, the agency determined that Synetics' proposal was technically acceptable, and the work was essentially to be accomplished by using the full-time services of the eight listed employees. The RFP provided that evaluation would be based on extension of the loaded hourly labor rates for these positions by a full year's work (2,080 hours) for each, for a total just under 17,000 hours per year. Under these circumstances, we believe that the cost evaluation clause required the agency to do no more than it did—analyze proposed labor rates, overhead, escalation rate, profit and extend the rates by the estimated hours to determine the most probable cost to the government. Here, after performing these calculations, the agency reasonably determined that the prices received were fair and reasonable.

Finally, BIMCO notes that prior to the award of Synetics, the agency had issued a purchase order to one of BIMCO's former subcontractors. BIMCO asserts that this purchase order encompasses work which will have to be performed under this RFP and which was included in BIMCO's proposal but not the awardee's. The protester contends, therefore, that the cost of the purchase order should have been considered an "other cost" to the agency of making award to Synetics, and that had the agency done so, BIMCO's proposal would have been evaluated as most advantageous to the government. This argument reflects BIMCO's misperception, to which we referred above, that the present RFP merely duplicates its prior contract. Since the requirement contained in the purchase order does not fall within the scope of the contract awarded to Synetics, the contracting officer properly did not consider the purchase order in her evaluation of proposals.

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Case 2: “A BAFO Too Low”

B-238259, Matter of: Technology Applications, Inc., May 4, 1990

Technology Applications, Inc. (TAI), protests the Naval Air Systems Command's award of a contract to Vitro Corporation for systems engineering and integration services for the Unmanned Aerial Vehicle program under request for proposals (RFP) No. N00019-89-R-0077. TAI contends that the Navy deviated from the evaluation scheme set forth in the solicitation by failing to assign it the highest rating for price reasonableness and by giving greater weight to technical merit than price. The protester also argues that the Navy failed to conduct meaningful discussions with it.

TAI submitted the lowest BAFO price of \$11,497,599, a reduction of \$1.7 million from its initial price. The cost evaluators determined that TAI's BAFO price was unrealistic and assigned it a rating of unsatisfactory with high risk for cost realism. The technical evaluation of the protester's proposal remained unchanged.

The PRB reconvened on December 11, and determined that an award to Vitro would best serve the government's interests. The PRB found that despite TAI's lower price, the overall superiority of Vitro's proposal in the technical and management areas—Vitro had received a rating of outstanding/low risk on its technical/management proposal—would afford the government the greatest overall benefit. On December 29, the contracting officer notified TAI that Vitro had been selected for award.

PRICE EVALUATION

TAI contends that the Navy deviated from the evaluation criteria set forth in the solicitation by failing to evaluate and assign it a high score for price reasonableness. The protester maintains that the RFP provided for the adjustment of prices for realism and the evaluation of prices, as adjusted, for reasonableness. ... it is clear from the record that the Navy did take into consideration the fact that the protester's price was low. The PRB recognized in its source selection memorandum that TAI had submitted the lowest BAFO price, but concluded that its proposal posed an unacceptable performance risk since TAI had proposed unrealistically low rates of compensation for its employees, which raised doubts as to its ability to retain qualified personnel. (FN1)

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FN1 The cost evaluators determined that the rates of compensation proposed for TAI employees were unrealistically low when compared with the rates paid for similar work on other Naval Air Systems Command contracts and to civil service employees in comparable positions, and that the potential difficulty of retaining employees at the proposed rates posed a risk to contract performance. The cost evaluators also found that the hourly rates for the Cadre services were burdened with unrealistically low overhead rates and that the possibility of unanticipated Cadre overhead costs posed a risk to contract performance.

Case 3: "Another low BAFO"

B-237555, Matter of: Ferranti International Defense Systems, Inc., February 27, 1990

Ferranti International Defense Systems, Inc. (FIDS), protests the award of a fixed-price contract to Raven Industries, Inc., under request for proposals (RFP) No. DAAB07-89-R-U503, issued by the Department of the Army for spare parts consisting of 43 National Stock Numbers to support the AN/VRC-12 radio set family. FIDS contends that it should have received the award as the lowest-priced offeror under the portion set aside for a defense mobilization producer.

FIDS received a marginal rating in all three non-price evaluation areas primarily because of an inadequately substantiated drop in its BAFO price, a history of poor past performance and alleged quality control deficiencies. **The evaluators specifically found that a substantial performance risk was associated with FIDS' proposal because FIDS' final proposed price of \$56,057,000, which was the lowest received, represented a significant, insufficiently explained decrease of \$19.6 million (26 percent) from its initial price.**

FIDS essentially objects to the award to Raven at a higher price. ... FIDS notes that the primary reason the agency gave FIDS a marginal rating was FIDS' unsubstantiated reduction in its BAFO price. FIDS, however, maintains that adequate justification for its price reduction was included in its BAFO, where FIDS indicated

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its: (1) intention to redistribute the module mix between FIDS and its subcontractors; (2) decision to capitalize \$1 million worth of test equipment; and (3) estimates of future savings due to efficiency. FIDS contends that its offer was responsive, did not reduce the quantity or specifications of the products to be supplied, and that FIDS was responsible for producing the items, regardless of the profit margin.

The Army asserts that these general statements alone were inadequate to determine if FIDS' price reductions were justified. The Air Force argues that FIDS failed to revise its technical proposal to indicate the effect of the price reduction on its technical proposal. Primarily, the agency points out that FIDS failed to specify the reduction in labor hours represented by this price decrease and to show how it could perform the work at the lower price. The Army states that its analysis of the basis for the price reduction was further complicated by FIDS' significant increase in overhead and general and administrative rates in its BAFO. Also, for example, the Army found that, without more information, it was not clear why or how the change in module mix between FIDS and its subcontractors explained the lower price. It further advises that while FIDS implied that the subcontractors had revised their prices downward, no pricing information associated with these revisions were submitted with the BAFO. As a result, the Army believes it reasonably concluded that FIDS' unsubstantiated, significant price reduction presented a significant performance risk.

We think the agency's determination that FIDS' BAFO price reduction was inadequately substantiated and justified a marginal and significant performance risk rating is supported by the record. Initially, we note that the BAFO request specifically required, in the event of a price revision, a complete cost breakdown setting forth the revisions and the basis for the changes. **The risk of poor performance when a contractor is forced to perform at little or no profit is, in general, a legitimate concern in the evaluation of proposals.** See *Burnside-Ott Aviation Training Center, Inc., et al., B-233113 et al.*, Feb. 15, 1989, 89-1 CPD P 158. An agency may properly downgrade a BAFO as being technically deficient when it does not contain an adequate explanation of price reductions from a previously acceptable initial proposal and may, where consistent with the terms of the RFP, award to a higher-priced technically superior offeror. *Systems & Processes Eng'g Corp., B-234142*, May 10, 1989, 89-1 CPD P 441. Here, the record indicates that FIDS' price reduction was not adequately explained as required by

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the RFP. FIDS' BAFO merely contained general statements supporting the reduction without any detailed or persuasive explanation for it. FIDS failed to explain how the price reduction affected its technical proposal generally and the labor hours proposed specifically.

Moreover, the BAFO statements that the price reduction was based on FIDS' intention to redistribute module mix production between FIDS and the subcontractors or on savings based on future efficiencies, without supporting evidence, reasonably could be considered as an inadequate or speculative basis for the price reduction. We therefore conclude that the agency reasonably considered FIDS' proposal marginal because it concluded that the firm's low fixed price represented a significant performance risk.

Further, an agency is not obligated to reopen negotiations so that an offeror may remedy defects introduced into a previously acceptable offer by a BAFO. See RCA Service Co., B-219643, Nov. 18, 1985, 85-2 CPD P 563 As indicated above, offerors were specifically advised to explain any price revision proposed in their BAFOs. Thus, FIDS assumed the risk that changes in its final offer might raise questions about its ability to perform and thus result in a determination that its proposal presented a high performance risk. Consequently, we find that the Army was not required to reopen discussions to allow FIDS to further explain its price reduction.